(2)

No. 95-1826

In The

# Supreme Court of the United States

October Term, 1995

D. L. THOMAS and HAZEL THOMAS,

*Petitioners,*

v.

AMERICAN HOME PRODUCTS, INC., BOYLE-MIDWAY, INC., and AMAZING PRODUCTS, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the United States District Court for the Northern District of Georgia created a class of illiterate product users?

2. Whether the Eleventh Circuit erred in exercising its discretion by not certifying to the Georgia Supreme Court the question of whether *Banks v. ICI Americas, Inc.* is retroactive?

3. Did any alleged failure of the Eleventh Circuit to certify the question of whether *Banks v. ICI Americas, Inc.* is retroactive have any effect on this case since *Banks v. ICI Americas, Inc.* does not affect the outcome of this case?

4. Whether the Eleventh Circuit departed from binding precedent as alleged by the Petitioners?

## PARTES TO THE PROCEEDING

All of the parties to the proceeding are listed in the caption of the case. There are no parent or subsidiary companies to be listed.



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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request this Court deny the Petition for Writ of Certiorari which seeks to reverse the judgment of the Court of Appeals for the Eleventh Circuit.

## OPINIONS AND JUDGMENT BELOW

In Appendix 1a-21a to the Petition for Writ of Certiorari, Petitioners have provided the Order of the United States District Court for the Northern District of Georgia entered on 9-30-93. Appendix 22a-23a contains the Amended Order of the United States District Court for the Northern District of Georgia entered on 10-8-93. Petitioners filed an invalid Petition for Rehearing to the Eleventh Circuit, because the Court had not overlooked, misapprehended or failed to distinguish any controlling point of law or fact. Attached as Appendix 24a-25a is the denial of the Petition for Rehearing. (58 F.3d 642). While the invalid Petition for Rehearing was pending, the Georgia Supreme Court issued its opinion in *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994).

On June 15, 1995 the denial of the Petition for Rehearing was recalled and the parties were directed to file briefs commenting on whether *Banks* had any effect on this case. On February 9, 1996, after receiving briefs by all parties on the issue, the United States Court of Appeals for the Eleventh Circuit denied the Petition for Rehearing.

## JURISDICTION

Jurisdiction is not invoked under 28 U.S.C. §2101(c) as alleged by the Petition. Jurisdiction is conferred by 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

O.C.G.A. §15-2-9 set forth in Appendix A;

Rules of the Supreme Court of the State of Georgia, Rule 46 set forth in Appendix B;

Federal Rule of Appellate Procedure 40 set forth in Appendix C

## COUNTERSTATEMENT OF FACTS

On the morning of February 8, 1990 Petitioner, D.L. Thomas, poured a chemical drain opener known as Lewis Red Devil Lye (hereinafter "LRDL") directly from the can into a floor drain. (5/2/91 Depo. D.L. Thomas, p. 90). This drain was located in a commercial building owned by Fieldale Farms Corporation (hereinafter "Fieldale") in Clarksville, Georgia. At the time of his accident, Petitioner was an employee of Fieldale. (5/2/91 Depo. of D.L. Thomas, p. 11). Petitioner alleges that as he poured LRDL into a floor drain the contents of the drain blew back into his face.

Mr. Thomas did not know that on the day before this accident his co-workers, Tony White and J. Lawton



Wofford, had been using Liquid Fire and LRDL in an attempt to unclog the floor drain, shower drain and standpipe drain in the floor of the Fieldale building in Clarkesville, Georgia. (5/21/91 Depo. of D.L. Thomas, pp. 60-78; Pet. Appendix 5a). These drains were approximately three to four feet apart from one another and were connected together, draining into one central pipe under the concrete slab floor, which then exited the building. Thus, the contents of anything poured into one drain would mix in the drain pipe with anything poured into another drain.

Years prior to the accident, this central floor drain pipe had been cut in half outside of the building when a ditch had been dug. The ditch was then back-filled, permanently plugging the drain pipe with dirt. (Depo. Robert McClain, pp. 21, 28, 43; Pet. Appendix 4a). Petitioner and the other workers were unaware that the drains had been permanently plugged at the time they attempted to unclog them. (5-2-91 Depo. D.L. Thomas, p. 51; Depo. John Wofford, p. 34; Depo. Tony White, p. 37; Pet. Appendix 4a). Petitioner has testified that he never would have attempted to use any drain cleaner had he known the pipe had been cut. (5-2-91 Depo. D.L. Thomas, p. 52).

On the day prior to the accident when Mr. Thomas' two co-workers were attempting to unclog the floor drain, a shower drain and a standpipe drain, they used two different types of drain chemicals. (Pet. Appendix 4a, 5a). These drain cleaners had been purchased by Fieldale employee J. Lawton Wofford at a local hardware store that afternoon. Mr. Wofford purchased *two twelve ounce cans* of LRDL and *one gallon* of a drain chemical called

Liquid Fire. (Depo. J. Lawton Wofford, p. 9; Pet. Appendix 4a). LRDL consists of one hundred (100%) percent sodium hydroxide or lye. Liquid Fire consists of approximately 96% concentrated sulfuric acid. (Pet. Appendix 4a). It is well established and undisputed that combining sodium hydroxide with sulfuric acid in a drain is an extremely explosive mixture which can cause the contents of a drain to "blow back", as occurred in this case. (Pet. Appendix 4a).

As of the evening prior to the accident, significant amounts of both LRDL and Liquid Fire had been added to this drain system. At least *one full can* of LRDL and *one full gallon* of Liquid Fire had been added to the three drains. (Depo. Tony White, pp. 30-31; Pet. Appendix 4a). These empty containers were then thrown in the trash by co-worker Tony White.

In addition, Petitioner testified that at the time of the accident he poured the remainder of a can of Red Devil Lye into a floor drain. (Pet. Appendix 5a). Thus, the other portion of the second can of Red Devil Lye was added to the floor drains at some time immediately prior to Petitioner's accident.

Petitioner acknowledges that he poured the contents of the lye directly into the floor drain without measuring the amount that went in the drain and without watching to see how much lye entered the drain. After the drain blew back, Petitioner attempted to flush his eyes with water for approximately one minute in a sink faucet. (5-2-91 Depo. of D.L. Thomas, p. 114). There were no eyewitnesses to Petitioner's accident. The Petitioner was



found by co-worker Tony White some time later standing outside the building with a pair of coveralls on his face.

After the accident an analysis was performed on residue from the drain blow back by Dr. Gene Ashby, Professor of Chemistry at Georgia Tech. Dr. Ashby performed a series of tests on residue he scraped from a porcelain light fixture directly above the drain where Petitioner was kneeling at the time of his accident. Dr. Ashby's analysis of the drain residue has established that the residue contained large portions of sodium sulphate.[1] (Pet. Appendix 7a). Sodium sulphate is formed when sodium hydroxide (LRDL) mixes with sulfuric acid (Liquid Fire), a volatile combination. (Pet. Appendix 7a).

It is undisputed that at no point on the day prior to Petitioner's injury, or on the morning of Petitioner's injury, did either the Petitioner or his co-workers read the label warnings or directions on either of the cans of LRDL or on the one gallon container of Liquid Fire. (5-2-91 Depo. D.L. Thomas, p. 86; Depo. Tony White, p. 26; Depo. J. Lawton Wofford, pp. 18, 49; Pet. Appendix 5a, 6a).

Petitioner's wife had reportably read him a portion of a label on a LRDL can on one occasion sometime between three and five years prior to the accident. (5-2-91 Depo. D.L. Thomas, p. 59, Depo. Hazel Thomas, p. 11; Pet. Appendix 6a). The only thing Petitioner recalled being told by his wife was to use three tablespoons of the

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[1] Contrary to Petitioners' assertions, Charles Blake did not depose that this accident was not caused by the mixing of sodium hydroxide and sulfuric acid. (Depo. Charles Blake, pp. 128, 129, 138).

product, to keep his face away from the drain, and not to use the product with hot water. (5-2-91 Depo. D.L. Thomas, p. 145; Pet. Appendix 6a).

Petitioner admitted that he knew that it was dangerous to mix drain cleaners. (5-2-91 Depo. D.L. Thomas, p. 21). Mr. Thomas knew not to use any other chemicals, including sulfuric acid with LRDL. (5-2-91 Depo. D.L. Thomas, pp. 42, 87-88). Mr. Thomas already knew that combining lye with sulfuric acid was a "dangerous mixture." (5-2-91 Depo. D.L. Thomas, pp. 87-88). Mr. Thomas knew that when using chemicals such as drain openers, one has to follow the directions and use the chemicals carefully or risk injury. (5-2-91 Depo. D.L. Thomas, pp. 22, 119).

At the time of Petitioner's accident, he had attended school up to the third grade and could only read "just the least bit." (5-2-91 Depo. D.L. Thomas, pp. 8-10). He could not read a newspaper, magazine or a letter. He could not write any words other than his name. His supervisors and co-workers knew he could not read. (5-2-91 Depo. D.L. Thomas, pp. 48, 82).

The actions taken by the Petitioner and his co-workers in using LRDL were directly contrary to the following warnings and directions on the label:[2]

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[2] In 1989 the label/warning on LRDL was changed. However, for purposes of the motion for summary judgment, the district court assumed that the older 1986 version of the label was affixed to the product.



(1). Although the 1986 label instructed users to **"READ PRECAUTIONS ON BACK PANEL CAREFULLY", "IMPORTANT: READ ENTIRE LABEL BEFORE OPENING OR USE",** USE LEWIS RED DEVIL LYE ONLY as directed on this label . . . Any other use may result in serious personal injury . . . " Petitioner and his co-workers failed to read the label or ask anyone else to read the label to them prior to using the product.

(2). *Two different types of drain cleaners, an acid and a base, were used* prior to Petitioner's injury in attempting to unclog the drains. The 1986 label warns: "To avoid dangerous backup or spattering, **NEVER** use LYE with any chemicals or drain cleaners before, during, or after using LYE since LYE may react with such products violently."

(3). At the time of Petitioner's injury, Petitioner had to have had his face and head above the drain he had been attempting to unclog as he alleges that the blow back struck his face. The 1986 warning label on LRDL read in part: "keep **face** and **hands** away from drain, container or solution while lye is in use." **"KEEP LYE AND SOLUTIONS OF LYE AWAY FROM EYES, SKIN, MOUTH AND CLOTHING; MAY CAUSE BLINDNESS."**

(4). The Petitioner never measured how much lye he used on the morning of his accident and put lye in the drain without watching it go into the drain. Petitioner's co-workers also used the product. The 1986 label states "add three (3) tablespoons of LYE into drain. . . . "

This instruction obviously enables the user to determine exactly how much of the product is being put into the drain.

(5). *The entire contents of two (2) twelve ounce cans of LRDL* were apparently used prior to Petitioner's injury in attempting to unclog the floor drain. These chemicals were added *in a number of applications.*

As set forth above, the LRDL label instructs users to use three (3) tablespoons of lye. It further warns, "if drain is still closed after 30 minutes, repeat application ONE time ONLY."

*Moreover, one full gallon of Liquid Fire was used on the drain prior to Petitioner's injury. The Liquid Fire label instructs the user to use a maximum of no more than four (4) ounces.* The Liquid Fire label also expressly warns: "to avoid violent eruption, never use before, with or after other drain openers."

(6). Following Petitioner's injury, *Petitioner testified that he attempted to flush his eyes with water for approximately one (1) minute.* The 1986 warning label on LRDL instructed that if lye gets into the eyes, they must: "immediately hold face under running water for twenty (20) minutes with eye open – by force if necessary. Then cover with clean dressing or sheet. Call physician immediately."

The undisputed facts of this case demonstrate that this accident was caused by the unknown third-party acts of Mr. Thomas' co-workers and unforeseeable consequences. (Pet. Appendix 17a).



## COUNTERSTATEMENT OF PROCEDURAL HISTORY

Petitioners filed suit in Fulton Superior Court for the State of Georgia, and the case was properly removed to the United States District Court for the Northern District of Georgia under diversity of citizenship.

The Respondents moved for and were granted summary judgment. The trial court found that the proximate cause of Petitioner's injuries was unforseeable acts of third parties and not any alleged negligence by the Respondents. Judge Forrester's holding that the drain at issue was clogged is not erroneous as this fact was indisputably established by the testimony in the case. Moreover, the district court properly found, based on the undisputed testimony, that the cause of the explosion was the mixture of the drain cleaners used by Mr. Thomas and his co-workers.

The testimony of Charles Blake does not, as alleged by Petitioners, create an issue of fact as to the cause of this explosion. Mr. Blake said that he was not sure of the cause while Dr. Gene Ashby's testimony conclusively establishes that it was caused by the mixture of the drain cleaners.

Further, contrary to Petitioners' contentions, the district court did not create a class of illiterate users for which it is permissible to discriminate. In addition, Petitioners did not properly raise an equal protection claim in the trial court or the Eleventh Circuit.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. PETITIONER HAS NOT BEEN DENIED EQUAL PROTECTION OF THE LAWS.

The Petitioners' allegations that by granting summary judgment the trial court Judge, the Honorable Owen Forrester, created a class against whom it is permissible to discriminate because of their disability is not grounded in the law or the facts of this case.[3] Petitioners' entire argument is premised on the following faulty statement: By granting summary judgment "the trial court effectively held that an illiterate user is not entitled to simple pictorial warnings of the dangers of the products he is using." (Petitioners' Petition for Certiorari, p. 11). Contrary to the Petitioners' contentions, the trial court did not create a separate class of illiterate users of products, but rather, held that users of a product, whether literate or not, are entitled to pictorial warnings.

> [T]he court finds that Thomas provided a reasonable basis to support a failure to warn claim based upon Defendants' failure to provide additional pictorial warnings reasonably likely to apprise him of their products' dangerous qualities sufficient. *See Rhodes*, 722 F.2d at 1520.

(Pet. Appendix, 16a). Thus, in direct opposition to Petitioners' contention, Judge Forrester did not create any

[3] It is noteworthy that Petitioners failed to raise any equal protection argument in the courts below. Therefore, because no extraordinary circumstances are involved, this Court should not even consider Petitioners' equal protection argument. (*see generally Yee v. City of Escondido, California*, 503 U.S. 519, 112 S.Ct. 1522 (1992)).



class of illiterate users for which Georgia products liability law permits discrimination.

The Respondents' motions for summary judgment were granted because Judge Forrester correctly held that the proximate cause of Mr. Thomas' injuries was not and could not have been from inadequate warnings.

> The simple facts are that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals, nor was he aware that any drain cleaner other than Lewis Red Devil Lye had been added to the drain system. Thus, any deficiency in the Defendant's products' warning labels did not cause Plaintiff Thomas's injuries. His injuries were caused by unknown third-party acts and unforeseeable consequences.

(Pet. Appendix, 22a).

Therefore, the trial court's clear and unambiguous ruling is that, irrespective of the mode of communication, no conceivable warning that the manufacturers of these products could have given would have prevented this accident. Rather the accident was proximately caused by Mr. Thomas' unknowing use of the product when another drain cleaner was already present in the drain and "the simple fact that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals."[4] (Pet. App. 22a). Moreover, Mr.

[4] Despite Petitioners' contentions that the drain was not clogged at the time of the accident, they admit that even after Mr. Thomas' co-workers used a gallon of Liquid Fire and at least one full bottle of LRDL, water remained in the drain.

Thomas knew it was dangerous to mix cleaners. (5-21-91 Depo. D.L. Thomas, p. 21). Thus, a warning regarding what he already knew would have been fruitless.

Since the proximate cause of Mr. Thomas' injuries was in no way connected to the adequacy of the warnings, the trial court did not create a class of users of a product for which discrimination is permitted, and the Petitioners have not been denied equal protection of the laws.

## II. THE ELEVENTH CIRCUIT DID NOT ERR IN REFUSING TO CERTIFY TO THE GEORGIA SUPREME COURT THE QUESTION OF WHETHER *BANKS V. ICI AMERICAS, INC.* IS RETROACTIVE AND *BANKS* HAS NO APPLICATION TO THIS CASE.

Contrary to Petitioners' contention, the Eleventh Circuit Court of Appeals did not err in failing to certify to the Georgia Supreme Court the question of whether *Banks v. ICI Americas*, 264 Ga. 732 (450 S.E.2d 671) (1994) is retroactive. Notably absent from the Petitioners' argument is any citation supporting the position that this issue should have been certified to the Georgia Supreme Court. The law clearly and unequivocally establishes that it is solely within the court's discretion to determine whether to certify a question.

> (a) The Supreme Court of this state, by rule of court, may provide that when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this state which are determinative of the case and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify the questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning the questions of propositions of state law, which certificate the Supreme Court of this state may answer by written opinion.

O.C.G.A. §15-2-9, Appendix A; Rules of the Supreme Court of the State of Georgia, Rule 46, Appendix B.

More importantly, whether *Banks v. ICI Americas* applies retroactively does not alter the outcome of this case and as such, the issue of whether the retroactivity question should have been certified to the Georgia Supreme Court is irrelevant and not grounds for granting this Petition for Writ of Certiorari.[5] The Eleventh Circuit expressly recognized that other grounds, separate and apart from the issue of *Banks'* retroactivity, existed for upholding the District Court's grant of summary judgment and for the denial of the Petition for Rehearing:

> In part because we conclude, for the reasons expressed in *I.C.I. Americas v. Banks*, 460 S.E.2d 797, 798 n.1 (Ga. App. 1995), that the holding of the Georgia Supreme Court in *Banks v. I.C.I.*, 450 S.E.2d 671 (Ga. 1994), would not apply to the injuries involved in this case, we deny the Appellants' Suggestion of Rehearing (or Hearing) En Banc and Appellants' Petition for

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[5] On April 29, 1996 the Georgia Supreme Court held that *Banks v. ICI Americas*, 264 Ga. 732 (1994) applies retroactively.

> Rehearing. See also, *General Motors Corp. v. Rasmussen*, 340 S.E.2d 589 (Ga. 1986) (Georgia law recognized partial prospectivity).

(Petition, App. 28a).

There are several reasons why the *Banks* decision does not affect the outcome of this case and why the decisions of both Judge Forrester and the Eleventh Circuit are correct. First, Petitioners had no legal basis for filing a Petition for Rehearing in the Eleventh Circuit Court of Appeals. Federal Rule of Appellate Procedure for the Eleventh Circuit, Rule 40 (Appendix C), governs the filing of petitions for rehearing and sets forth a very particular standard that must be met for a proper and legally reviewable petition to be filed:

> The petition must state with particularity the points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to be present.

While the Petitioners admittedly recognized that *Center Chemical v. Parzini*, 234 Ga. 868 (218 S.E.2d 580) (1975) and its progeny remained valid law when the Petition for Rehearing was filed, they nevertheless asked the Eleventh Circuit to certify to the Georgia Supreme Court the question of whether the Georgia court would depart from this long-standing precedent. This is obviously not the purpose of a Petition for Rehearing. The Petitioners improperly used the appeal process to delay the dismissal of their case in hopes that a favorable ruling would be handed down in the interim.



This filing of an appeal, in hopes of having a fortuitous decision entered while the case was pending on appeal, is not the purpose of, nor permissible under, the Federal Rules of Appellate Procedure. Thus, since no grounds existed for the filing of the Petition for Rehearing and because the trial court's decision was based on valid and applicable Georgia law at the time of its decision, the denial of the Petition for Rehearing was warranted. There was simply no basis for asking or requiring the Eleventh Circuit to inquire of the Georgia Supreme Court where clearly established and long-standing Georgia law remained valid after 20 years. As such, the improper filing of the Petition for Rehearing constitutes a separate and distinct reason for the denial of the Petition for Rehearing by the Eleventh Circuit.

Because this case was not properly pending before the Eleventh Circuit, it could not exercise its discretion to certify any question to the Georgia Supreme Court. The Petition for Rehearing was invalid, and therefore the Eleventh Circuit properly denied it. Thus, the subsequent *Banks* decisions have no effect on this case.

Lastly, there is no compelling reason for this Court to grant these Petitioners' Writ of Certiorari. There are no compelling or significant constitutional issues, no issue involving preemption, no questions relating to federal statutes, and no issues with broad applicability to the welfare of the general public which will impact other litigants. Irrespective of whether the product was defective, even under a retroactive application of *Banks*, and regardless of whether the warnings were legally adequate, the Petitioners' claims cannot be sustained.

As the trial court correctly held, the Petitioners must prove every element of their claim to survive a motion for summary judgment. The Petitioners could not prove every element of their claim, because the proximate cause of Mr. Thomas' injuries was "unknown third-party acts and unforeseeable consequences." (Pet. Appendix 17a).

Petitioners try to circumvent this point in their Petition for Rehearing by arguing that Judge Forrester erred in even considering the proximate cause issue, inasmuch as the threshold question of the adequacy of the warning was clearly for the jury. This is patently incorrect. There is no threshold question which must be submitted to the jury before other elements of the Petitioners' claim can be considered. The court can evaluate all of the elements and if one fails, the claim fails. After all, this is the very purpose of summary judgment. (*See Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986)).

As there are ample bases to support the district court's grant of summary judgment and the Eleventh Circuit's affirmation of that ruling,[6] this Petition for Writ of Certiorari should be denied.

Lastly, even if the holding in *Banks* was applied to this case, the trial court's grant of summary judgment was still proper. The *Banks* decision does not change the well-established principle of law in Georgia that a manufacturer does not occupy the status of insurer and is

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[6] The Eleventh Circuit may affirm the District Court's decision without a written opinion, as it did in this case, when the lower court's decision is supported by the record. (11th Cir. R. 36-1) (Appendix D).



under no duty to make a product that is accident proof or foolproof. *Hunt v. Harley-Davidson Motor Company, Inc.*, 147 Ga. App. 44 (248 S.E.2d 15) (1978). "We affirm that under Georgia law a manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury." *Banks* at 677. Under this very well-reasoned principle of law, an automobile is not defective merely because a drunk driver kills someone while driving it. Similarly, the product at issue in this case, Lewis Red Devil Lye drain cleaner, is not defective because when misused, and used in direct contradiction to its warnings, it causes injury.

In the Order granting the Respondents' Motions for Summary Judgment, Judge Forrester found that the accident in question occurred when two different drain cleaners were mixed together in excess proportions. (Pet. Appendix 4a, 5a) Thus, the Lewis Red Devil Lye was severely misused when it was combined in excess amounts with another drain cleaner, in direct contradiction to the warnings. Moreover, Appellant, D.L. Thomas, admitted that he was aware of the fundamental principle that different types of chemicals, including drain cleaners, should not be mixed. (5-21-91 Depo. D.L. Thomas, pp. 42, 87-88). The trial court considered these factors, which are also factors in a risk-utility analysis pursuant to *Banks*, and found that the products were not defective as a matter of law due to the misuse of the product. (Pet. Appendix 6a, 7a, 22a, 23a).

Petitioners will probably argue that because their expert, Dr. Abraham, testified that in his opinion there existed alternative safer designs, they are entitled to a trial. Georgia courts have long recognized, and the

Supreme Court in *Banks* reiterated, that virtually every product is capable of producing injury, and just because someone testifies that he thinks that an alternative design exists now, as opposed to the time of the incident, does not mean that the product is defective. Nor does it mean that Petitioners are entitled to a trial in light of evidence that the product was misused and used adversely to the warnings.

Therefore, even applying a risk-utility approach, as urged by the Petitioners, and contested by the Respondents, it cannot be said that the Lewis Red Devil Lye was defectively designed.

In conclusion, in denying the Petition for Rehearing the Eleventh Circuit recognized that several bases existed for denying the Petition for Rehearing and for upholding the trial court's decision. The Petition for Writ of Certiorari presents no grounds for overturning those decisions and lacks any justiciable issue that needs to be decided by this Court. As such, the Petition for Writ of Certiorari should be denied.

## III. THE ELEVENTH CIRCUIT FOLLOWED BINDING PRECEDENT.

The adequacy of the warning in this case is irrelevant to the outcome; thus, Petitioners' argument that it is necessarily a jury question is erroneous. As previously discussed in Parts I and II of this Reply Brief in Opposition to Petition for Writ of Certiorari, the trial court found, and the Eleventh Circuit correctly upheld, that the incident in question was a result of the unforseeable and intervening acts of third parties which would not have



been prevented by even the most perfectly conveyed warning. Therefore, Petitioners' argument that whether the warning at issue was adequate should be a question for the jury is baseless and presents no grounds for a Petition for Writ of Certiorari to this Court.

Moreover, Petitioners' argument that the Eleventh Circuit departed from the binding precedents of this Circuit is fallacious. The cases relied upon by the Petitioners, *Watson v. Uniden Corporation of America*, 775 F.2d 1514 (11th Cir. 1985), *Rhodes v. Interstate Battery System of America*, 722 F.2d 1517 (11th Cir. 1984), and *Stapleton v. Kawasaki*, 608 F.2d 571 (5th Cir. 1979), *modified on other grounds*, 612 F.2d 905 (5th Cir. 1980), are inapposite to the instant one. All of those cases involved facts where the injuries complained of were, as a matter of law, proximately caused by the alleged dangerous propensity of the products at issue. Therefore, the Eleventh Circuit did not fail to follow binding precedent, but instead, correctly refused to apply distinguishable and inapplicable case law to the present case.[7]

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[7] Moreover, while generally the adequacy of a warning is a question for the jury, the well established principle of law in Georgia is that "in plain, palpable and indisputable cases . . . [where] reasonable minds cannot differ as to the conclusions to be reached," summary judgment is appropriate. (*Watson v. Uniden Corp. of America*, 775 F.2d 1514 (11th Cir. 1985)) (citing *Hercules, Inc. v. Lewis*, 168 Ga. App. 688, 309 S.E.2d 865 (1983). The case sub judice is a plain, palpable and undisputed case where reasonable minds cannot differ as to the adequacy of the written warning given. That is, Respondents' label specifically warned against the very incident and harm complained of: That the product should not be used in conjunction with other drain cleaners or chemicals because a dangerous and violent reaction could result from such misuse.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX A

CODE OF GEORGIA

TITLE 15. COURTS

CHAPTER 2. SUPREME COURT

ARTICLE 1. GENERAL PROVISIONS

Current through the End of 1995 Extraordinary Session of the General Assembly

15-2-9 Answers to questions certified by federal appellate courts.

(a) The Supreme Court of this state, by rule of court, may provide that when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this state which are determinative of the case and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify the questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning the questions or propositions of state law, which certificate the Supreme Court of this state may answer by written opinion.

(b) The Court of Appeals shall not have jurisdiction to consider any question certified under this Code section by transfer or otherwise.

(Code 1933, Sec. 24-3902, enacted by Ga. L. 1977, p. 577, Sec. 1.)

## APPENDIX B

### RULE 46. FEDERAL COURTS

When it shall appear to the Supreme Court of the United States, to any Circuit Court of Appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such federal appellate court may certify such questions or propositions of the laws of Georgia to this Court for instructions.

[Adopted effective May 22, 1995.]

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## APPENDIX C

### FRAP 40. PETITION FOR REHEARING

**(a) Time for Filing; Content; Answer; Action by Court if Granted.** A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

**(b) Form of Petition; Length.** The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

[Amended April 30, 1979, effective August 1, 1979; April 29, 1994, effective December 1, 1994.]

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## APPENDIX D

### *11th CIR. R. 36-1. AFFIRMANCE WITHOUT OPINION*

*When the court determines that any of the following circumstances exist:*

*(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;*

*(b) the evidence in support of a jury verdict is sufficient;*

*(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;*

*(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;*

*(e) the judgment has been entered without a reversible error of law;*

*and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.*

[Amended effective April 1, 1994.]

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